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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In the Matter of The Lopez Family Trust,
Dated March 8, 1993

EDWARD LOPEZ,

Appellant,

v.

LETICIA LOPEZ,

Respondent.

2d Civil No. B208083
(Super. Ct. No. 56-2007-00308431-
PR-TR-VTA)
(Ventura County)

Edward Lopez is the beneficiary of a trust. His sister, Leticia Lopez (respondent), is the trustee. Lopez appeals from a final order denying his probate petition for relief from a breach of fiduciary duty by respondent. (Prob. Code, §§ 1304, subd. (a), 17200, subd. (b)(12).)¹ Appellant contends that the probate court erroneously ruled that, pursuant to section 16061.8, his petition constituted a time-barred contest of the trust. We reverse.

Factual and Procedural Background

On March 8, 1993, Mary Lopez (Mary) and her husband, Salvador Lopez (Salvador), executed a declaration establishing the Lopez Family Revocable Trust (Trust). The Trust provided that, upon the death of the first spouse, the Trust property

¹ All statutory references are to the Probate Code.

would be divided into two separate trusts: a marital deduction trust designated as the Lopez Survivor's A-Trust (Trust A) and a credit shelter trust designated as the Lopez Family B-Trust (Trust B). The surviving spouse would have the power to amend or revoke Trust A. Trust B could not be amended or revoked "except as may be authorized by a power of appointment or power of withdrawal expressly authorized by the terms of [Trust B]." The Trust contained a no-contest clause.

In 1997 the Trust was amended to give the surviving spouse the power to designate property of Trust B "to such one or more persons consisting of the issue of Settlers, on such terms and conditions, . . . and in such proportions as the Surviving Spouse directs"

Salvador died in 2000, and Mary became sole trustee. In 2004 Mary executed a deed of trust encumbering Trust property in Oxnard. The deed of trust secured payment of a loan of \$711,000. Appellant's petition alleged that the loan proceeds were used to improve the Oxnard property, which "houses the Family business 'Sal's Mexican Inn.' "

In May 2005 Mary executed a document amending Trust A and exercising her limited power of appointment with respect to Trust B. The document provided that, upon Mary's death, the assets of Trust A would be merged into Trust B. A residence in Camarillo was specifically devised, in equal shares, to appellant and his brother, Salvador Lopez Jr. They "shall assume any encumbrances on the property at the time of [Mary's] death, including, but not limited to, any mortgage, deed of trust and real property taxes and assessments." The residue of the Trust estate, including the Oxnard Property, would be distributed in equal shares to respondent and her sister, Hermalinda Lopez.

On August 15, 2006, Mary resigned as trustee and appointed respondent as her successor. On that same date, Mary transferred a 60.5 percent interest in the Camarillo residence to respondent as trustee of Trust A and a 39.5 percent interest in the same property to respondent as trustee of Trust B. On October 26, 2006, respondent deeded the residence back to Mary, who executed a first deed of trust encumbering the property in the amount of \$749,500. Mary then deeded the residence back to respondent as trustee of Trust A and Trust B. On November 9, 2006, respondent, as trustee of Trust A and

Trust B, executed a second deed of trust further encumbering the residence in the amount of \$75,000.

As a result of the above transactions, the Camarillo residence specifically devised to appellant and his brother was encumbered in the total amount of \$824,500. Respondent acknowledges that the proceeds of the \$749,500 loan secured by the Camarillo first deed of trust were used to pay the \$711,000 debt secured by the deed of trust on the Oxnard property. On April 24, 2007, a reconveyance of the deed of trust on the Oxnard property was recorded. Respondent also acknowledges that the proceeds of the \$75,000 loan secured by the Camarillo second deed of trust were used "to pay off [a] current business loan" involving the Oxnard property.

Mary died on March 11, 2007. On December 3, 2007, appellant filed the instant petition. He alleged that respondent had "breached her fiduciary duty to the beneficiaries of the specific devise [of the Camarillo residence] by causing the debt on the Oxnard residue property to be shifted to the Camarillo specific devise." Appellant further alleged that respondent "had a close and confidential relationship with Mary," had "unduly influenced Mary . . . to execute . . . the necessary Deed and loan documents," and had "actively participated in the procurement" of the \$749,500 loan secured by the first deed of trust on the Camarillo property. Appellant requested that respondent (1) be enjoined from distributing the trust assets, (2) be removed as trustee, (3) be ordered to pay damages to appellant, and (4) be ordered to provide an accounting of trust transactions since her appointment as trustee on August 15, 2006. In addition, appellant requested that the encumbrances on the Camarillo residence be set aside and that a constructive trust be imposed "over the residue property, or the proceeds of said property."

In her opposition to the petition, respondent contended that the petition was "nothing more than a trust contest" because it "challenges the provisions set forth in the estate plan" of Mary and Salvador. Respondent pointed out that, following Mary's death, she had promptly served appellant with the notification required by section 16061.7. The notification said in boldface type that appellant could not bring an action to contest the Trust more than 120 days from the date of service of the notification. Because appellant

had filed his petition long after the expiration of the 120-day period, respondent argued that the petition was time-barred pursuant to section 16061.8. This section provides in relevant part: "No person upon whom the notification by the trustee is served pursuant to this chapter may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her"

In the alternative, respondent argued that the petition should be denied on its merits because she had not breached her fiduciary duty as trustee. This argument was based on factual allegations in verified declarations from respondent; Richard E. Doerner, Mary's bookkeeper; and Michael M. Israel, the attorney who prepared the original Trust instrument and all amendments. Appellant filed objections to the declarations. He requested "an evidentiary hearing and that the hearing be set for a long cause matter following discovery."

A hearing was conducted on January 2, 2008. No evidence was presented at that time, and appellant reiterated his demand for an evidentiary hearing: "We have a matter here that does require a full evidentiary hearing at some point." The court took the matter under submission. It said that it would consider appellant's evidentiary objections to the declarations filed by respondent.

On February 28, 2008, the court denied the petition "in total." The court did not state any reasons for its denial. Nor did the court state whether it had sustained or overruled appellant's objections to the declarations.

Nature of the Probate Court's Ruling

"As an aspect of the presumption that judicial duty is properly performed, we presume . . . that the court knows and applies the correct statutory and case law [citation] and is able to distinguish admissible from inadmissible evidence, relevant from irrelevant facts, and to recognize those facts which properly may be considered in the judicial decisionmaking process. [Citations.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) We therefore presume that, in view of appellant's evidentiary objections, the court did not consider as evidence the declarations of respondent, Doerner, and Israel. "

'[W]hen challenged in a lower court, affidavits and verified petitions may not be considered as evidence at a contested probate hearing. [Citations.]' [Citation.]" (*Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1309; see also § 1022 ["[a]n affidavit or verified petition shall be received as evidence when offered in an *uncontested* proceeding under this code" (emphasis added)]; *In re Fraysher's Estate* (1956) 47 Cal.2d 131, 135 [Probate Code "authorizes the use of affidavits or verified petitions as evidence ' . . . in any uncontested probate proceedings'; but there appears to be no statutory provision authorizing the substitution of affidavits for oral evidence in a contested probate proceeding such as this"].)

Since we presume that the probate court did not consider the declarations as evidence, the only basis for the denial of appellant's petition was that on its face the petition constituted a contest of the Trust that was time-barred by the 120-day rule.² In effect, therefore, the probate court sustained a demurrer to the petition without leave to amend. "The time-bar of a statute of limitations may be raised by demurrer '[w]here the complaint discloses on its face that the statute of limitations has run on the causes of action stated in the complaint, [for the reason that] it fails to state facts sufficient to state a cause of action. [Citation.]' [Citation.]" (*County of Los Angeles v. Commission on State Mandates* (2007) 150 Cal.App.4th 898, 912.)

The following remarks by the probate court support the interpretation that it in effect sustained a demurrer to the petition: "[I]f I grant the relief [respondent is] requesting this morning, it's tantamount to summary judgment. I don't hear any evidence - - well, perhaps a demurrer on its face. It says that the pleading is insufficient to allow me to get to the conclusion [appellant] would like me to come to." (RT 16)

² The parties do not dispute that the probate court's ruling was based on this ground. Respondent "submits that such ruling is consistent with the probate court finding the matter was time-barred." She alleges that "it does not appear that the probate court addressed" the "substantive issues of undue influence." Appellant declares: "[I]t is presumed that the ruling was based on a finding by the court that the Petition constituted a 'contest' and, therefore, was untimely, pursuant to section 16061.7" "[I]t is clear that the trial court never reached the merits of the Petition, but rather, denied it on procedural grounds."

The Petition on Its Face Did Not Constitute a Contest of the Trust

Appellant concedes that respondent served him with the notification required by section 16061.7 and that his petition was filed more than 120 days after service. Thus, if his petition constituted a contest of the Trust, it would be time-barred pursuant to section 16061.8. "[O]ur standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.] We deem to be true all material facts properly pled [citation] and those facts that may be implied or inferred from those expressly alleged [citation]." (*Montclair Parkowners Ass'n v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

Section 21300 defines "contest" for purposes of determining whether a no-contest clause has been violated. The same definition should apply for purposes of determining whether there has been a time-barred trust contest within the meaning of section 16061.8. Pursuant to section 21300, a contest may be either direct or indirect. " 'Direct contest' . . . means a pleading in a proceeding in any court alleging the invalidity of an instrument or one or more of its terms" based on specified grounds, one of which is "[u]ndue influence." (§ 21300, subd. (b)(7).) " 'Indirect contest' means a pleading in a proceeding in any court that indirectly challenges the validity of an instrument or one or more of its terms based" on a ground not listed in section 21300, subdivision (b). (*Id.*, subd. (c).)

We agree with appellant that his petition was not a contest of the Trust because it did not allege the invalidity of any of the Trust provisions. Appellant did not challenge the 2005 document in which Mary had amended Trust A and had exercised her limited power of appointment with respect to Trust B. Pursuant to that document, appellant and his brother were entitled to receive only the residence in Camarillo. Appellant challenged respondent's involvement, as trustee, in the shifting of the debt on the residue Oxnard property to the specifically devised Camarillo residence. This transaction was to appellant's detriment but benefited respondent, since she and her sister were designated as the recipients of the residuary estate.

We recognize that the 2005 document required appellant and his brother to "assume any encumbrances on the [Camarillo residence] at the time" of Mary's death.

We also recognize that the trustee had the power "[t]o borrow money and to encumber trust property." But these provisions did not give respondent carte blanche to remove the encumbrance of the residuary estate at the expense of property specifically devised to other beneficiaries. As trustee, respondent had "a duty to deal impartially" with all beneficiaries (§ 16003) and "a duty not to use or deal with trust property for [her] own profit." (§ 16004, subd. (a).)

Respondent argues that appellant's petition constituted a contest of the Trust because it sought to impose a constructive trust on the residue Oxnard property. We disagree. In seeking this relief, appellant was not attempting to establish the invalidity of any Trust provision. The relief was sought solely as an alternative equitable remedy for respondent's breach of fiduciary duty. The underlying theory was that respondent would be unjustly enriched if she were permitted to receive the unencumbered Oxnard property without compensating appellant for the encumbrances on the Camarillo residence. " 'A constructive trust is a *remedy* used by a court of equity to compel a person who has property to which he is not justly entitled to transfer it to the person entitled thereto.' " (*Burger v. Superior Court* (1984) 151 Cal.App.3d 1013, 1018.) "The essence of the theory of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing. [Citations.]" (*Communist Party v. 522 Valencia, Inc.* (1995) 35 Cal.App.4th 980, 990.)

Estate of Watson (1986) 177 Cal.App.3d 569, is instructive here. In *Watson* a father's will provided for specific bequests to his two daughters. The residue of his estate was left to his wife, the daughters' stepmother. The will contained a no-contest clause. When wife died eight months later, the daughters were not mentioned in her will. They filed a creditors' claim and a complaint against wife's heirs for breach of contract, constructive trust, and injunctive relief. The daughters claimed that wife had orally promised father that she would transfer the residue to them upon her death. Wife's heirs contended that the daughters had violated the no-contest clause of father's will. The appellate court concluded that no such violation had occurred: "Here, the daughters do not seek . . . to establish the will is any way invalid, e.g., due to fraud or undue influence

[citation] but rather seek enforcement of a separate and distinct oral agreement. As such their creditors' claim and complaint are based on a 'source of right independent of the will.' [Citations.] [¶] Nor does it appear the daughters' filing of the creditors' claim and complaint to enforce the oral agreement is 'designed to result in the thwarting of the testator's wishes as expressed in his will.' [Citation.]" (*Id.*, at p. 573.)

In the instant case, as in *Watson*, appellant does not seek to establish that the Trust is any way invalid due to fraud or undue influence. His claim arises from a source independent of the Trust instrument: respondent's alleged breach of fiduciary duty in exercising undue influence over Mary and causing her to shift the debt on the Oxnard property to the Camarillo residence. Nor is appellant's petition designed to thwart Mary's expressed intent to leave the Oxnard property to respondent and her sister and the Camarillo residence to appellant and his brother. Appellant's position is that, because of respondent's undue influence, Mary did not freely intend to encumber the Camarillo residence and use the loan proceeds solely for the benefit of the Oxnard property.

Disposition

The order denying appellant's petition is reversed, and the matter is remanded to the probate court with directions to conduct an evidentiary hearing. Costs to Appellant.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Kent Kellegrew, Judge
Superior Court County of Ventura

Howard Gold, Howard Gold A Professional Corporation, in Association
With Larry Webb, for Appellant.

Steven S. Feder, Tareq M. Hishmeh; Hathaway, Perrett, Webster, Powers,
Chrisman & Gutierrez, for Respondent.